



Comptroller General
of the United States
Washington, D.C. 20548

Decision

Matter of: Cardion, Inc.--Reconsideration

File: B-249069.2

Date: November 9, 1992

Stephen P. Younger, Esq., Patterson, Belknap, Webb & Tyler, for the protester, Mary G. Curcio, Esq., and John Brosnan, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Where protester's only concern with agency's failure to definitize a previously awarded letter contract is how that failure affects protester's ability to submit an offer under a current solicitation, protest against the failure to definitize the letter contract concerns an alleged impropriety in the solicitation process which must be timely under the rules governing protests of apparent solicitation defects. Protest here is untimely because protester knew that the letter contract would not be definitized prior to the due date for the submission of best and final offers and did not file protest until after that date.

2. Request for reconsideration is denied where request does not set forth errors of fact or law in prior decision that warrant reversing or otherwise modifying that decision.

DECISION

Cardion, Inc. requests reconsideration of our decision in Cardion, Inc., B-249069, June 18, 1992, in which we dismissed as untimely Cardion's protest of the linkage of an undefinitized letter contract to its ability to compete under solicitation No. N00024-91-R-5612, issued by the Navy for radar display units.

We deny the request for reconsideration.

On May 28, 1991, the Navy issued solicitation No. N00024-91-R-5612Q to procure up to 1500 SPA-25G radar display units. Up until that time, Cardion had been the sole source of supply for these items. On September 23, to meet its immediate need for radar display units while the procurement was pending, the Navy entered into an undefinitized letter

contract with Cardion for 237 units. The letter contract contained a definitization provision linking the competitive procurement to the letter contract. Specifically, the clause provided that if Cardion were awarded the competitive procurement the Navy could definitize the price of the 237 radar display units which it was purchasing under the letter contract at Cardion's price for the equivalent quantity of units under its competitive offer. Cardion initially expressed concern about this provision to the Navy, but was reassured that the letter contract would be definitized within 180 days after it was awarded, and that the cost provision would only be utilized if Cardion was awarded the contract within 180 days after the letter contract had been awarded. In this regard, Cardion states that the Navy advised Cardion that the provision was inserted into the letter contract to insure that Cardion did not gain an advantage over its competitors by purchasing materials for the letter contract and the competitive solicitation at the same time. This would be an issue only if Cardion was awarded the contract under the competitive solicitation soon after the letter contract was issued. Cardion submitted its initial offer with this understanding. However, when on April 20, the Navy requested best and final offers, the 180-day period had passed and the Navy had informed Cardion that the contract would not be definitized until after the submission of BAFOs.

On June 16, 1992, Cardion protested to our Office that the Navy's failure to definitize the letter contract for the display units adversely affected its ability to submit a competitive offer under the instant solicitation because it had to take into account whether the price it offered under the competitive procurement would override the price of its letter contract. We dismissed the protest as untimely under our Bid Protest Regulations, 4 C.F.R. § 21.2(a)(1) (1992), because the relationship between the letter contract and the terms of the solicitation had become apparent prior to the due date for the receipt of best and final offers (BAFO) and should have been protested before that time.

Cardion argues in its request for reconsideration that its protest was timely because the rules governing the timeliness of protests of solicitation defects did not require the protest to be filed before the closing date for BAFOs. In the alternative, Cardion asserts that even if untimely its protest should be considered under the "good cause" and "significant issue" exceptions to our timeliness rules. For the reasons set forth below, we find our dismissal was proper.

Cardion first argues that our dismissal of the protest as untimely because it was not filed before the closing date for receipt of BAFOs "misconstrued the facts and misapplied the regulations" regarding the timely filing of protests. In this regard, Cardion argues that its protest did not concern a solicitation defect and the timeliness rules which apply to such protests are not relevant here.

We do not agree. The basis for Cardion's protest was that the Navy's failure to definitize the letter contract adversely affected its ability to submit a competitive offer. Although the protest did not allege a solicitation defect per se, because Cardion's sole concern with the letter contract was its impact on Cardion's ability to compete, we viewed the protest as analogous to those where the alleged improprieties are not solicitation defects but defects in the solicitation process. We consider such protests under the timeliness rules governing apparent solicitation defects. See Wabash DataTech, B-224550, Feb. 11, 1987, 87-1 CPD ¶ 149 (protest based on impropriety that arises out of the negotiation process must be filed before next closing date for receipt of proposals).

Under our Regulations, protests which are based on alleged solicitation improprieties--or defects in the solicitation process--which are apparent prior to bid opening, or the time set for the receipt of initial proposals must be filed prior to bid opening, or the time set for the receipt of initial proposals. 4 C.F.R. § 21.2(a)(1). In addition, an alleged impropriety that did not exist in the initial solicitation but is subsequently incorporated into it must be protested no later than the next closing date set for the receipt of proposals. Id. Here, on April 20, 1992 when the Navy requested that BAFOs be submitted, Cardion knew that the 180-day deadline for definitization of the letter contract had passed and that the letter contract would not be definitized until after the submission of BAFOs. The alleged improper linkage between the letter contract and the competitive solicitation was thus incorporated into the solicitation process no later than this time. Accordingly, Cardion was required to file its protest regarding this impropriety no later than the next closing date set for the receipt of proposals, which in this case was April 30, the

¹Cardion's assertion that the our Regulations only required that its protest be filed prior to "bid opening" confuses the distinction between sealed bid procurements and negotiated procurements. "Bid opening" relates to sealed bids; "time set for receipt of initial proposals" relates to negotiated procurements such as the one in which Cardion was participating. There is no "bid opening" in negotiated procurements.

date set for the receipt of BAFOs. Since Cardion did not file a protest until June 16, its protest was untimely.

Cardion also argues that if its protest is untimely, it should be considered under the good cause or significant issue exception to our timeliness rules found in our Regulations at 4 C.F.R. § 21.2(c).

The good cause exception is limited to circumstances where some compelling reason beyond the protester's control prevented it from filing a timely protest. Central Texas College, B-245233.5, Feb. 6, 1992, 92-1 CPD ¶ 151. Cardion argues that "good cause" exists in this case because it interpreted the provision of our Regulations requiring that the protest be filed prior to the opening of bids as including the award of the contract to the lowest responsible bidder. There is no reasonable way, however, that our Regulations, which in this regard have been in effect and have been applied for the past 20 years, can be interpreted in this manner. Moreover, we fail to see the relevance of that interpretation here since the solicitation was not issued as an invitation for bids and thus there was no bid opening. Accordingly, we have no basis to conclude that any compelling reason beyond Cardion's control prevented it from filing a timely protest. Consequently, we will not consider Cardion's untimely protest under the good cause exception to our timeliness rules.

Cardion also argues that its protest warrants consideration under the significant issue exception to our timeliness rules. Under this exception we consider untimely protests that raise issues of widespread interest to the procurement community and which have not been considered on the merits in a previous decision by our Office. DynCorp, 70 Comp. Gen. 38 (1990), 90-2 CPD ¶ 310.

Cardion asserts that the issue it has raised is significant because the Navy's unusual linkage of the competitive solicitation to an undefinitized letter contract has never before been considered by our Office. Cardion further argues that the issue is of widespread interest and importance to the entire procurement community because similar linkage arrangements and the alleged adverse effects resulting from such arrangements may occur in the future.

Although we agree that this particular issue has not been previously addressed in our decisions, Cardion has not demonstrated that the issue is significant. Specifically, while we recognize the importance of the matter to Cardion, we fail to see how it is of widespread interest to the procurement community. Accordingly, we will not consider Cardion's protest pursuant to the significant issue exception.

Since Cardion has not shown that our dismissal was based on errors of fact or law, nor offered new information that would warrant its reversal or modification, the request for reconsideration is denied. See 4 C.F.R. § 21.12(a).

A handwritten signature in cursive script that reads "Ronald Berger".

Ronald Berger
Associate General Counsel